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No. 98-1359

In The

Supreme Court of the United States

October Term, 1998

LYNDEN AIR FREIGHT, INC.,

Petitioner,

v.

DIRECTOR OF TAXATION, STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

RESPONDENT'S BRIEF IN OPPOSITION

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I. REASONS FOR DENYING THE WRIT

Petitioner taxpayer Lynden Air Freight attacks a plainly correct and reasonable decision – ruling that, for 49 U.S.C. § 40116 preemption purposes, ground transportation activities are not a part of "interstate air transportation" – by misstating the court's holding, and attempting to mislead this Court. Once the court's holding is correctly stated, it becomes unassailable, primarily because "interstate air transportation" is defined very clearly to include only transportation "by aircraft." Aside from this controlling plain language, the position urged by petitioner is not supported by the congressional intent, and would lead to absurd results. Finally, not only are there no cases directly conflicting with the Hawaii Supreme Court ruling, but all cases that have actually considered the preemption issue raised by this case *support* the Hawaii Supreme Court's decision.

A. Petitioner Critically Misstates the Holding of the Hawaii Supreme Court in a Specious Attempt to Denigrate the Court's Decision.

Petitioner seriously misstates the Hawaii Supreme Court's ruling in an attempt to mislead this Court. Petitioner wrongly claims the Hawaii Supreme Court ruling allows taxation of *air* transportation activities as long as the "functions [are] not performed in an aircraft," Pet. at 5, or "take place on the ground." Pet. at 1. The Hawaii Supreme Court never adopted such a position and petitioner's suggestion otherwise is a patent misrepresentation. Functions directly involved with air activities may very well fall within "interstate air transportation" *even*

though they occur on the ground – e.g., removal of cargo from plane, planning and scheduling the air flights, coordinating personnel to work the flight, cleaning of planes on ground, etc. All the Hawaii Supreme Court did was rule that activities that are properly associated with the ground *transportation* (and other non-air-related) portions of Lynden's delivery service[1] do not fall within "interstate air transportation," a ruling that, unlike the position petitioner falsely claims the Hawaii Court took, is unremarkable. It is *not* our position, nor the Hawaii Supreme Court's, that any activity that physically occurs on the ground is necessarily not "interstate air transportation." Activity that directly relates to the *air transportation* portions, even if it occurs on the ground, may very well be "interstate air transportation."[2] Activity, however, that relates to the *ground transportation* (or other *non-air-*

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[1] Examples would include trucking of packages to recipient destinations, removing packages from the trucks, and handing them over to particular recipients or to a pick-up counter.

[2] Similar erroneous statements about the Hawaii Supreme Court's holding or the issue presented in this case are made throughout the certiorari petition. *See, e.g.*, Pet. at 4 (inaccurately characterizing the tax as being applied to receipts from services *"performed on the ground"*); Pet. at 5 (wrongly stating Hawaii court found no preemption because the "tax was imposed on receipts attributed to activities . . . that *took place on the ground"*); Pet. at 6 (wrongly stating issue as "whether tax may be imposed on gross receipts allocated to any activity that *occurs on the ground"*); Pet. at 9 ("attributed to activities *performed on the ground."*); Pet. at 11 ("that *occur on the ground"*); at 14 (listing activities "that *take place on the ground"*); at 14-15 ("that *occur on the ground"*); Pet. at 24 n.13 ("activities that *took place on the ground"*).

related) portions of the delivery service is not "interstate air transportation." That is all the Hawaii court held.[3]

Taxpayer's position in this case, however, is that even activity directly involving the ground transportation (or other non-air-related) portions of the delivery service falls within "interstate air transportation," on the theory that it is all part of an overall air delivery service. As discussed in section B, infra, this position is clearly wrong and violates the plain language of the statute.

Contrary to taxpayer's assertion, the Hawaii Supreme Court did *not* "uph[o]ld a state tax on *some* of the gross receipts from the sale of air transportation." Pet. at 9. Instead, the Hawaii Court held that gross receipts from the ground transportation (or other non-air-related) activities of Lynden were simply *not* "air transportation," specifically, "interstate air transportation."[4]

It cannot be emphasized too much that the question of whether the particular apportionment of receipts between air transportation activities, and ground transportation (and other non-air-related) activities, was

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[3] Similarly, the "Hawaii Ground Costs" in the numerator of the formula, *see* Pet. at 4, only included ground costs relating to ground transportation (or other non-air-related) activities, not ground costs associated with air services. *See* Petitioner's Answering Brief (in Hawaii Supreme Court) at 4. As discussed later, infra at 3 - 5, the accuracy of the apportionment (including use of this formula) has never been challenged in this case.

[4] "Air transportation" is defined as "foreign air transportation, interstate air transportation, or the transportation of mail by aircraft." 49 U.S.C. § 40102(a)(5).

properly made in this case is *not* at issue in this Court.[5] In other words, whether certain receipts should be deemed to fall on the air transportation side of the line versus the ground transportation (or other non-air-related) side of the line is not before this Court. For petitioner stipulated in the trial court that "if the State can tax a portion of Lynden's gross receipts it claims are attributable to ground portions of the delivery service, the assessment of additional tax, penalties and interest of $500,595.28 is correct." Record on Appeal at 186 (Affidavit of Allen at paragraph 2). Thus, the only issue in this case is whether or not functions associated with the ground transportation (and other non-air-related) activities of Lynden can be taxed. This Court is *not* presented with the question of which particular functions fall on the ground transportation (or other non-air-related) activities side of the line, versus the air activities side of the line, or whether the amount of receipts taxed reflects the proper allocation. *See* discussion of taxpayer's position at page 3, supra.

Accordingly, petitioner's entire discussion pointing out ground activities that may indeed fall on the air side of the line, Pet. at 13-14, is irrelevant. If such activity does fall on the air side of the line, it should not be taxed. But Lynden, by its stipulation, has effectively conceded that the $500,595 in taxes at issue in this case is based upon

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[5] Nor was the apportionment at issue before the Hawaii Supreme Court. Pet. at 16a ("Likewise, we do not consider whether the State correctly attributed receipts between the 'air' and 'non-air' services provided.").

receipts from activities which fall on the ground transportation (or other non-air-related) side of the line,[6] and simply is arguing that such receipts nevertheless come within the "interstate air transportation" definition. In short, Lynden is claiming in its petition that *all* of its ground activities, even functions that are as far divorced from the air carriage part of its operations as imaginable – e.g., trucking package to recipient destination – are "interstate air transportation" because they are part of an overall delivery that includes air components. As demonstrated below, this position is wholly without merit.

B. Petitioner's Attempt to Include Ground Transportation within the "Interstate Air Transportation" Definition Violates the Plain Language of the Statute, Runs Counter to Congressional Intent, and Leads to Absurd Results.

It is important to note that taxpayer virtually completely avoids discussing the precise statutory language at issue in this case, instead relying upon nebulous, misleading, or irrelevant policy arguments. Taxpayer apparently recognizes that its position is in direct violation of the plain language of 49 U.S.C. § 40102(a)(25), which requires quite unambiguously that "interstate air transportation" be *"by aircraft."* Taxpayer argued below (and must be arguing to this Court, too, although it appears embarrassed to explicitly do so) that subsection (B)'s "when any part of the transportation is by aircraft" language sweeps up ground transportation, too.

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[6] It is undisputed, after all, that Lynden has not been taxed on the activities that all sides agree fall on the air side of the line.

The plain language of the definition of "interstate air transportation," however, shows that taxpayer's reading is wrong. By its express terms, "interstate air transportation" is defined in the body of the definition as transportation *"by aircraft."* There is simply no way, short of amending the English language, to include *ground* transportation within that very clear definitional phrase. Taxpayer has yet to come up with any argument to overcome this plain reading of the statute. Nothing in subsection (B) modifies the express requirement that the transportation included within the definition of "interstate air transportation" be *"by aircraft."*

The correct reading of the statute as a whole is: Subsection (A) includes transportation by aircraft that *by itself* consists of travel between the points provided therein (e.g., the aircraft flies from one state to another). The effect of the addition of subsection (B) – "when any part of the transportation is by aircraft" – is to extend the definition to cover *aircraft* segments that may not, by themselves, be *interstate,* but form a part of an *overall interstate* journey (which may include nonaircraft segments) "when any part of [that journey] is by aircraft." In short, subsection (B) allows the definition of "interstate air transportation" to encompass *intra*state flights that are part of an overall *inter*state trip. A simple example will suffice: If a package is flown from Los Angeles, CA, to San Francisco, CA, by air, and then taken by truck to Denver, CO, the flight to San Francisco, although purely intrastate, constitutes "interstate air transportation," because the overall trip is interstate (Los Angeles, *CA,* to Denver, *CO*). The truck portion from San Francisco to Denver, however, although interstate, is not "interstate

air transportation" because it is not "by aircraft," as the initial clause of the definition requires.

This interpretation of subsection (B) as modifying the *interstate* aspect of the definition, rather than the *by aircraft* aspect of the definition, is confirmed by the more careful language of the original version of the definition. The original version, 49 U.S.C. § 1301(21), which all sides agree was not intended to have been substantively changed by the recodification, Pet. at 5 n.4, reads:

> "Interstate air transportation" . . . mean[s] the carriage *by aircraft* of persons or property . . . *in commerce* between . . .
>
> > (a) a place in any State of the United States . . . and any place in any other State . . .
>
> *whether such commerce* moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

(emphasis added). As in the recodified version, the original version expressly defined "interstate air transportation" as "the carriage *by aircraft*." Significantly, Congress had initially included the phrases "in commerce" and "whether such commerce" that plainly referred to the overall interstate commerce defined in subsection (a). By including the words "whether such commerce" in the last clause, Congress made clear that the last clause was meant to clarify that the overall interstate flow of commerce required by subsection (a) may be wholly by aircraft, or partly by aircraft and partly by other forms of transportation. As a consequence, any "carriage by aircraft" (including an *intra*state flight) that constitutes a

part of an *overall inter*state trip is deemed to be "interstate air transportation."

In no event, however, was the last clause meant to eliminate the requirement that a transportation leg itself be "by aircraft" in order to fall within the definition of "interstate air transportation," as taxpayer erroneously contends. Indeed, to read the last clause the way taxpayer does would make the "by aircraft" language in the first clause of the definition completely superfluous. For if one reads the entire statute with the "when any part . . . " [or "whether such commerce . . . "] language construed to include ground or sea segments (as long as there is an air segment at some point) as taxpayer does, the presence of the "by aircraft" language in the initial part of the definition has no effect whatsoever. Such an interpretation making critical language superfluous must be rejected. *See Astoria Federal Savings & Loan v. Solimino*, 501 U.S. 104, 112 (1991).

Finally, taxpayer's construction leads to absurd results. For all types of non-air transportation, from rail and truck to boat, would all be defined as "interstate air transportation," as long as some small part of the overall interstate trip were by air. For example, if a package were sent by *truck* from Denver to San Jose, by *rail* from San Jose to San Francisco, by *ship* from San Francisco to Honolulu, and then flown to Maui, all of the trucking, rail and ship carriage would be "interstate *air* transportation" and fall within the preemption provision, even though the air segment was only a minor part of the overall voyage. Taxpayer's position is simply not plausible.

Because taxpayer cannot overcome both the plain language of the statute, as well as the absurd results its construction engenders, it tries in vain to assert policy arguments that simply do not apply or support its position. Underlying most of its argument is the premise that none of Lynden's ground activities, even if involving *ground transportation* (or other plainly non-air-related) matters, can be distinguished from its air transportation services, since even the purely ground transportation activities are "integral" to, or "incidental" to, its air transportation services. There is simply no statutory basis for such an interpretation. The definition of interstate air transportation as "transportation . . . by aircraft" simply does not allow for such a reading. The definition would have had to say "transportation by aircraft *or transportation by nonaircraft that is integral [or incidental] to the transportation by aircraft,*" or equivalent. It did not.[7]

Not surprisingly, taxpayer can cite no case law supporting such an "integral" theory applying to the definition of "interstate air transportation." Taxpayer's theory is also inherently flawed, as there is no reason to conclude that the ground transportation portions are integral to the air transportation portions, rather than the other way around. After all, the service provided by Lynden is essentially a complete delivery service, that utilizes, air, truck, and any other means of transportation to get a

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[7] Nor could the "when any part of the transportation is by aircraft" clause justify its "integral" theory, for that clause, even read as taxpayer wrongly reads it, could not be limited to only "integral" non-air transportation, but would have to cover nonintegral non-air transportation, as well.

package from shipper to recipient. Thus, it would be more accurate to say that the air services, and the ground services, are integral to the overall delivery service, rather than saying the ground services are integral to the air services, or vice-versa.[8]

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[8] Taxpayer confuses the simple issue presented in this case by discussing, Pet. at 16-19, the shift of jurisdictional control over "the transportation of persons or property by motor vehicle when incidental to transportation by aircraft," *away from the Interstate Commerce Commission* (later the Surface Transportation Board), *see* 49 U.S.C. § 303(b)(7a) [rephrased and now codified at 49 U.S.C. § 13506(a)(8)(B)], and *to the Civil Aeronautics Board (CAB)* (later, the Secretary of Transportation). It was 49 U.S.C. App. § 1373(a) that formerly gave the CAB authority over "services *in connection with* . . . air transportation." *See Law Motor Freight, Inc. v. C.A.B.*, 364 F.2d 139, 140 & n.2 (1st Cir. 1966). But this shift of jurisdictional authority from ICC to CAB, for whatever else it may mean, does *not* mean that the definition of "interstate air transportation," *the only relevant definition in this case*, was ever expanded to include "services in connection with . . . air transportation." Rather, only carriage "by aircraft" was included.

Indeed, if "interstate air transportation" included "services in connection with . . . air transportation," there would have been no need for 49 U.S.C. App. § 1373(a) to *extend* CAB jurisdiction to such services, as the CAB (now Secretary of Transportation) always had jurisdiction over "interstate air transportation." *See, e.g.*, 49 U.S.C. § 41101 (requiring an air carrier to hold a certificate before providing "air transportation").

It is noted that as part of the deregulation of domestic rates under the Airline Deregulation Act, § 1373(a) was amended to no longer apply to *interstate* air matters. *See* 49 U.S.C.A. § 41504 (Historical and Statutory Notes, at 217-218). Because it still applies, however, to "practices *related to* . . . foreign air transportation," 49 U.S.C. § 41504(a)(1)(A), the Department of Transportation does have authority over some incidental (to

Taxpayer's claim that allowing states to tax the ground transportation portions of delivery services that include air components would somehow defeat Congress' goal in enacting the preemption provision is baseless. Pet. at 19-24. To suggest that taxation of ground transportation activities somehow imposes an impermissible burden on air transportation activities simply because delivery companies often combine the two is unjustified. Taxing ground transportation functions burdens the ground transportation functions, but it does not, by definition, burden the air transportation functions; only a tax *on the air transportation* could do that. This is common sense.

If a company chooses to combine ground transportation functions with air transportation services in order to provide a complete shipper to recipient service, it should not be allowed to claim that a tax on the ground transportation impermissibly burdens the air activities, which are separate and distinct untaxed activities. If Congress had meant to exempt all ground transportation functions from state taxation when they were tied or connected in some

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foreign air transportation) ground activity. That explains 14 C.F.R. § 222.1, giving the Department control over certain surface transportation (including, e.g., ground transportation) within 35 miles of an airport (*see* 14 C.F.R. § 222.2). Contrary to Lynden's assertion, Pet. at 26 n.16, however, Section 222.1, while not carefully worded, was *not* intended to define "air transportation" (specifically, "foreign air transportation") as including surface transportation, but simply implemented the Department's control over such surface transportation pursuant to its authority over "practices *related to* . . . foreign air transportation." 49 U.S.C. § 41504(a)(1)(A). In short, the surface transportation discussed *"related to"* "foreign air transportation," but was *not* "foreign air transportation."

way to air transportation functions, it could easily have done so, as in the hypothetical definition given on page 9, supra. It did not do so.[9] Taxpayer merely asserts, but can point to nothing suggesting Congress believed state taxes on ground transportation activities were harmful to development of a national air transportation system. Indeed, to the contrary, "[t]he legislative history is replete with references to *air* travelers, *air* passengers and *air* transportation." *Salem Transportation Co. v. Port Authority*, 611 F. Supp. 254, 257 (S.D.N.Y. 1985) (emphasis in original); *see, e.g.*, 1973 U.S.C.C.A.N. at 1434-35, 1449-51.

Taxpayer's suggestion that a state could evade the ban on air taxes by simply jacking up the ground transportation taxes, Pet. at 22-23, misses the point. A state that did so would end up deterring *ground transportation*, not air transportation. Indeed, a state that did so would actually *encourage* more complete *air* transportation – i.e., packages being delivered via a route that uses as little ground transportation as possible – because the air portions remain untaxed while the ground portions would become prohibitively expensive. Congress' goal, after all, was *not* to prevent states from raising the same revenue through ground taxes, it was to prevent states from

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[9] Taxpayer is simply wrong in suggesting that Congress, when it rejected an Ohio proposal, rejected a tax like the one upheld below. Pet. at 20. The Ohio proposal permitted taxes upon *air* transportation gross receipts "fairly apportioned to a State," and thus could have allowed a state to tax, for example, in-state removal of cargo from an airplane. The Hawaii tax, on the contrary, is not applied to *air* transportation activities at all, even if apportionable to Hawaii, but is applied only to ground transportation (and other non-air-related) functions.

taxing air transportation. A hiked-up ground tax, as long as it is imposed only on ground transportation (or other non-air-related) activities,[10] does not tax nor deter air transportation.

In short, taxpayer's entire policy argument begs the question: taxpayer simply *assumes* that a tax on Lynden's ground transportation *is* a tax on air transportation, and thus improperly burdens air transportation. The problem is that petitioner makes no viable argument to show that a tax on Lynden's ground transportation is a tax on air transportation. As discussed earlier, a tax on ground transportation is *not* a tax on air transportation because it is a tax on activity that is *not* "by aircraft."[11]

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[10] To be sure, a tax on ground transportation that were levied at a higher rate *only* when the ground transportation was connected to air transportation (and at a lower rate when not so connected) would discriminate against air transportation. Hawaii, of course, imposes no such discriminatory tax.

[11] Taxpayer's claim that a state tax on ground transportation would "interfere with adopting a uniform national pricing structure," Pet. at 20 n.10, because of potentially differing taxes from state to state, is without merit. First, petitioner cites nothing to support the notion that a "uniform national pricing structure" motivated the preemption provision. Second, even assuming uniform pricing were a goal, as discussed above, the differing tax would be imposed on *ground* transportation, not air transportation, and thus would not affect uniform pricing of the *air portions* of delivery services, *air* matters being Congress' only focus. Third, differing state taxes affect the uniformity of prices of complete shipper to recipient services (including both ground and air components) no more so than differing (from state to state) costs of all sorts, e.g., differing gasoline prices, truck repair costs, etc. Finally, it is hardly remarkable that packages shipped from and to different locations might be priced differently.

Furthermore, a key and critical purpose behind the preemption of state taxes on air transportation was Congress' desire to avoid the *double* taxation that would result if states as well as the Federal government taxed air transportation.

> This Committee never intended that air travelers would be subject to state and local head taxes as well as to national user charges. . . . [S]tate and local head taxes constitute an inequitable, double burden of taxation on air passengers.
>
> . . . .
>
> . . . Air passengers are already being charged sufficiently at the Federal level through an 8 percent user charge on domestic tickets and $3 per person on international tickets, and it is not necessary to place a double burden on them.

Senate Report No. 93-12, 93rd Cong., 1st Sess. (1973), reprinted in 1973 U.S.C.C.A.N. 1434, 1450; *see also Aloha Airlines, Inc. v. Director of Taxation,* 464 U.S. 7, 9 (1983) (major concern was "double taxation"); *Salem Transportation,* 611 F. Supp. at 257 (same). It is clear *and undisputed,* however, that the ground transportation portions of Lynden's business are not subject to the federal government's air tax. That tax is imposed by 26 U.S.C. § 4271 upon "taxable transportation," which is defined by 26 U.S.C. § 4272 to mean "transportation *by air* which begins and ends in the United States." Thus, because no federal air tax is imposed upon Lynden's ground transportation

activities (a fact Lynden has never disputed),[12] Hawaii's tax on that activity would obviously not impose the *double* taxation Congress sought to avoid.

For this additional reason, too, the Hawaii Supreme Court was correct in holding that Hawaii's tax on Lynden's ground transportation activities is not preempted.

Because the Hawaii Supreme Court's decision was so plainly correct, certiorari would simply waste this Court's time.

C. Not only are there No Decisions that Present a True Conflict with the Hawaii Supreme Court Decision, but All the Courts that Have Considered the Preemption Issue Support the Decision of the Hawaii Supreme Court.

The centerpiece of petitioner's search for a conflicting decision, *City of Philadelphia v. Civil Aeronautics Board*, 289 F.2d 770 (D.C. Cir. 1961), does *not* actually present a conflict with the Hawaii Supreme Court's decision. First, that case was plainly not a preemption case at all, and thus could not raise a true conflict with the Hawaii decision below. Even if the D.C. court adopted a definition of

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[12] Moreover, because Lynden is a *freight forwarder*, who does not perform the ground or air carriage transportation itself, it is not subject to the federal air tax for that additional reason. *See* 26 C.F.R. § 49.4271-1 ("the tax imposed by section 4271 . . . applies to amounts paid to an air carrier by a freight forwarder . . . for the transportation of property by air. *The tax does not apply to amounts paid* by a shipper *to a freight forwarder*. . . . ").

"interstate air transportation" that conflicts with the definition supplied by the Hawaii court – which, as demonstrated below, is *not* the case – because the D.C. court undeniably did *not* hold that a state tax on the trucking leg would be preempted, there is no actual conflict with the Hawaii decision finding no such preemption. This is especially true because the *City of Philadelphia* case, by not being a preemption case, was not subject to the more rigorous standard for finding preemption of state taxing authority. *See Dep't of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 345 (1994) (preemption of state taxing authority may only be found when it is "the *clear and manifest* purpose of Congress"); *California State Bd. of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844, 851-52 (1989) ("court must proceed carefully when asked to recognize an exemption from state taxation that Congress has not *clearly* expressed").

Second, putting aside the non-preemption nature of the *City of Philadelphia* case, which alone eliminates any true conflict, that case did *not* clearly adopt a definition of "interstate air transportation" that differs from the one adopted by the Hawaii court below. Contrary to petitioner's assertion (Pet. at 25), the court never expressly ruled that the trucking leg *itself* was "interstate air transportation." Rather, the court simply held that the fact that a portion of the overall trip was by non-air means (specifically, by truck), did not prevent the entire trip from being amenable to the "interstate air transportation" definition. 289 F.2d at 773 (rejecting notion that "truck service . . . prevents the *transcontinental* service . . . from being properly described as 'air transportation.' "). In

short, the *air* leg portion (California-Newark) could indeed be "interstate air transportation" despite the presence of the Philadelphia-Newark truck leg. But the court did *not* specifically rule that the truck leg was *itself* "interstate air transportation."[13] (And it is undisputed that the court did not rule the truck leg was "interstate air transportation" *for the purpose of preempting any state tax thereupon*.).

The only other Court of Appeals case petitioner asserts is in conflict with the Hawaii Supreme Court's decision is *Hill v. National Transp. Safety Bd.*, 886 F.2d 1275, 1280 n.6 (10th Cir. 1989), which contained a gratuitous statement in a footnote. First, the statement, besides being *wholly conclusory* with absolutely no supporting analysis, is only *dicta*. It thus cannot raise a genuine conflict worthy of this Court's attention. Second, as with the *City of Philadelphia* case, *Hill* was *not* a preemption case, and thus did not involve the more rigorous standard that must be met before finding preemption of a state tax. *See ACF Industries, Sierra Summit*, supra. *Hill* simply (and indisputedly) does *not* hold that a state tax on the ground transportation of property – even if ultimately linked to an air component – is preempted. Therefore, *Hill* plainly does not present a true conflict warranting this Court's certiorari jurisdiction.[14]

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[13] Nor was it necessary to make such a specific ruling, since all the court needed to do was fit the *overall* trip into a vague CAB certificate authorizing "air transportation."

[14] Petitioner's citation of *United States v. Petrykievicz*, 809 F. Supp. 794, 799 (W.D. Wash. 1992), does not create a sufficient conflict for many reasons. First, it is only a district court case, *see* Supreme Court Rule 10(b) (conflict must be with Court of

Petitioner has conceded, as it must, that there is no case holding a state tax on ground transportation activities to be preempted even though the ground transportation is connected, integrally or not, to air components. Moreover, petitioner cannot cite even a single case that unambiguously and in non-conclusory fashion adopts a definition of "interstate air transportation" that includes ground transportation, let alone one that does so in the preemption context. In short, there are no cases definitively addressing the issue in this case that support petitioner.[15]

Appeals decision); second, it is not a preemption case; and third, it deals with the different definition of "foreign air commerce." Moreover, the decision is essentially conclusory.

[15] Petitioner's reference to the *dissenting* opinion in *Federal Express Corp. v. California Pub. Util. Comm'n*, 936 F.2d at 1079 n.1, speaks for itself. Pet. at 25 n.15. Not only was the statement made on the losing side of a decision, the statement was not even clearly the opinion of the dissenting judge, but rather simply the judge's characterization of what one party was arguing. Moreover, even if the judge were taking a position, it was plainly dicta, as the judge was arguing that goods *never* transported at any point by air were not within any possible preemption. There was thus no need to resolve the question of whether goods being transported by truck, but which at some previous or subsequent time are transported by air, fall within a preemption provision.

It is important to note that the *Federal Express* case is, in fact, completely irrelevant to the case at bar because it *dealt with an entirely different preemption provision*, 49 U.S.C. § 1305, preempting laws "relating to rates, routes or services of any air carrier." *See In re Tax Appeal of Ray K. Kamikawa v. United Parcel Service*, 88 Haw. 336, 343, 966 P.2d 648, 655 (1998). This is a much broader provision than the preemption provision at bar, both because of the "relating to" language, and because it covers *all*

The only cases that actually do address the *preemption* question raised by this case all support the Hawaii Supreme Court's decision. In *In re Dave's Motor Transportation, Inc.*, No. TSB-D-90(3)C, 1990 N.Y. Tax LEXIS 100 (N.Y. Tax Appeals Trib. Mar. 22, 1990), the New York Tax Appeals Tribunal held that despite the fact Dave's Motor engaged in "the pickup and delivery of air cargo transported by airlines" at airports, did so in containers owned by American Airlines, in trucks which bore the "AA" insignia, and the air freight "moved under a single airway bill of lading for a single charge which covered the entire ground-air movement," New York's tax on Dave's Motor was *not* preempted. The Tribunal ruled that 49 U.S.C. § 1513 preempted "only air transportation and air commerce *by aircraft* and *not other forms of service or transportation which may affect air transportation* or air commerce by aircraft." *Id.* at LEXIS *12 (emphasis added).

Similarly, the United States Court of Appeals for the Ninth Circuit held that a fee charged on the gross receipts a rental car company generated from airport passengers was *not* preempted despite the fact the company serviced persons who had traveled by air, because "§ 1513(a) does not prohibit fees on ground transportation service." *Alamo Rent-A-Car v. City of Palm Springs*, 955 F.2d 30, 31 n.1 (9th Cir. 1992) (per curiam); *see also Airline Car Rental v. Shreveport Airport Authority*, 667 F. Supp. 293, 298-99 (W.D. La. 1986) (same). "Nothing in the text or legislative history of § 1513(a) suggests that it was intended to have

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services of any air carrier, not just "interstate air transportation," which is very narrowly defined to include only transportation "by aircraft." *Cf. id.*

any applicability to fees on ground transportation service." *Alamo*, 955 F.2d at 31 n.1.

Finally, the court in *Salem Transportation*, 611 F. Supp. 254 (S.D.N.Y. 1985), rejected preemption of a fee on the ground transportation of passengers who have traveled or will travel by aircraft, stating:

> There is no evidence that congress intended that § 1513(a) would include a prohibition of fees on ground transportation service. Section 1513(a) was intended to include only air transportation . . . *by aircraft* and *not other forms of service or transportation which may affect air transportation* . . . by aircraft.

611 F. Supp. at 257 (emphasis in original).

In sum, all of the cases that actually address the *preemption* question *support* the Hawaii Supreme Court's position. There is not a single preemption decision to the contrary. Accordingly, certiorari should be denied.

* * *

Contrary to taxpayer's characterization, Pet. at 10-11, Hawaii's Director of Taxation is not attempting to carve exceptions out of this Court's decision in *Aloha Airlines v. Director of Taxation*, 464 U.S. 7 (1983),[16] but is simply

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[16] Taxpayer's suggestion that the Director or the Hawaii Supreme Court naively distinguished *Aloha* because it dealt only with *passengers*, not *cargo*, Pet. at 10-11 & n.7, is patently frivolous. The Hawaii Supreme Court (and the Director) distinguished *Aloha* because it dealt with taxes on the carriage of things *by air*, whereas this case is about taxation of *ground* transportation (and other non-air-related) activities. *Lynden*, 89 Haw. 51, 55, 968 P.2d 653, 657 (Pet. at 10a).

ensuring that corporations do not improperly enlarge *Aloha* to cover *ground transportation* activities that are plainly not "by aircraft." At the very least, Congress did not "clearly" or "manifestly" demonstrate an intent to preempt taxes on such ground transportation functions.

II. CONCLUSION

Because the "interstate air transportation" definition clearly and unambiguously requires that the transportation be "by aircraft," because petitioner's contrary conclusion would lead to absurd results, and because there are no cases that directly conflict with the Hawaii Supreme Court ruling – indeed, all preemption cases on point support the decision – certiorari should be denied.

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Respectfully submitted,

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